LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
OCT 1 1958
JAMES R. BROWNING, Clerk

No. 363

In the

Supreme Court of the United States

DOVIE RAY BAKER, *et al.*,
Petitioners,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

D. L. CASE,
2800 Republic National Bank Building,
Dallas 1, Texas.
Counsel for Respondent.

Of Counsel:
JACKSON, WALKER, WINSTEAD, CANTWELL & MILLER,
2800 Republic National Bank Bldg.,
Dallas 1, Texas.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

INDEX

	Page
Statement	1
Argument	5
The Judgment of the Court of Civil Appeals Is Correct	5
Respondent Owed Decedent No Non-Delegable Duty	6
No Evidence of Respondent's Intent to Evade the Provisions of the Federal Employers Liability Act	7
No Evidence of Probative Value Raising Issue of Nichols' Status Being Other than that of Independent Contractor	8
Judgment Can Be Sustained on Local Law	9
No Question of Importance is Presented	12
Conclusion	13

	Page
Chicago, Rock Island & Pacific Ry. v. Bond, 36 Sup. Ct. 403, 60 L. Ed. 735, 240 U. S. 449	8
Cimorelli v. N. Y. Cent. Ry. Co., 148 Fed. 2d 575, 578	8
Conasauga River Lbr. Co. v. Wade, 221 Fed. 2d 312, 315 (certiorari denied), 350 U. S. 949, 76 Sup. Ct. 324, 100 L. Ed. 827	9
Del Vecchio v. Penn. R. R. Co., 233 Fed. 2d 2, 5	9
Dougall v. Spokane P. & S. Ry. Co., 207 Fed. 2d 843 (certiorari denied 1954), 347 U. S. 904, 98 L. Ed. 1063, 74 Sup. Ct. 429	6, 7, 8, 12
Erie Railroad Co. v. Margue, 23 Fed. 2d 664	8
Lees v. Chicago and Northwestern Ry. Co., 89 N. E. 2d 418 (Illinois Appellate Division)	7, 8
Miles v. Penn. R. R. Co., 182 Fed. 2d 411	9
Norman v. Spokane-Portland Seattle Ry. Co., 101 Fed. Sup. 350, affirmed, 192 Fed. 2d 1020, certiorari denied 342 U. S. 945, 72 Sup. Ct. 558, 98 L. Ed. 703	6-7
North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 256, 58 L. Ed. 591, 34 Sup. Ct. 305	6
Robinson v. Baltimore and Ohio R. R. Co., 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849	6
Security Union Ins. Co. v. McLeod, 36 S. W. 2d 449, 451 (Comm. App.)	10
Simonton v. Perry, 62 S. W. 1090, 1091 (Civ. App.)	10
Sinkler v. Missouri P. R. Co., 356 U. S. 326, 78 Sup. Ct. 758, 762, 2 L. Ed. 2d 799	6
Texas Employers' Insurance Association v. Harper, 249 S. W. 2d 677 (Er. Ref. N. R. E.)	10
Texas General Indemnity Co. v. Scott, 253 S. W. 2d 651, 152 Tex. 1	11

Page

Tinsley v. Massman Construction Co., et al., 270 S. W. 2d 835 (Sup. Ct. Missouri) 2 7

Travelers Ins. Co. v. Ray, 262 S. W. 2d 801, 803, Er. Ref. 10

Miscellaneous

Federal Employers Liability Act, 45 U. S. C.:

Sec. 51 (1) 5-6

Sec. 55 7

Texas Rules of Civil Procedure, Rule 279 (1) 10

Article 8307, Sec. 6a, Revised Civil Statutes 1925 (1) 10, 11

No. .....

In the

Supreme Court of the United States

DOVIE RAY BAKER, *et al.*,
Petitioners,

v.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

The question in this case is whether petitioners' decedent was an employee of respondent because:

(a) Respondent owed decedent a non-delegable duty to perform the particular work through its own employees;

(b) The purpose or intent of the contract between respondent and decedent's employer was to exempt respondent from any liability created by the Federal Liability Act; or

(c) The contract between respondent and decedent's employer, at common law, constituted the employer an agent of respondent as distinguished from an independent contractor.

This case has been tried twice to a jury resulting in both instances in a verdict for respondent.

Petitioners have been compensated for the death of decedent under the Workmen's Compensation Laws of Texas. (Tr. 14.)

Petitioners are Dovie Ray Baker, widow of Claude Baker, deceased, individually and in her capacity as administratrix of the Estate of deceased, and as next friend for the minor children of herself and decedent, Bobby Glen Baker, Claudette Baker and Oleta Fay Baker. Claude Baker, deceased, was hired by W. H. Nichols & Co., Inc. (S. F. 104.) Petitioners seek the coverage of the Federal Emoployer's Liability Act in spite of their previous representations to Nichols' compensation carrier that deceased was an employee of Nichols.

Respondent and W. H. Nichols & Co., Inc. entered into a written contract covering the work, a part of the performance of which deceased was engaged in at the time of his death. (Tr. 37-40.) The work to be performed was designated "grouting", which is designed to take care of water-pockets in Respondent's railway embankment. (S. F. 378.) The contract was entered into as a result of Respondent having advertised for bids. (S. F. 370.) The proposal for bids spelled out in detail the work to be done. (S. F. 372.) The nature of the work to be performed and

the place of performance were specified in the contract. (Tr. 38.) The contract provided for payment of a specified price and did not call for a cost plus arrangement. (Tr. 38.) The contract designated W. H. Nichols & Co., Inc. an independent contractor and provided that Nichols would not be subject to the detailed supervision and direction of Respondent, but would be responsible to Respondent only for the final results in the accomplishment of the work.

The work required special equipment which Respondent did not have. (S. F. 171.) The contract was entered into because Respondent did not have the necessary equipment or knowledge to perform the work. (S. F. 371.) The work called for in the contract was grouting (filling water-pockets in the roadbed with a mixture of sand, water and cement). The number of perforations to be made in the performance of the grouting work was left to the contractor (S. F. 172). The area of track to be grouted was determined generally by Respondent's roadmaster after making an inspection of the track. The decision as to where the grouting would be placed, the perforations, the drilling of holes, and where the mud pump would be used were determined by Nichols (S. F. 173, 379) Grouting is not regular maintenance, but is a special type of maintenance and is extraordinary maintenance. (S. F. 175 and 371.)

Respondent's inspector on the job, Slaton, had the duty of seeing that the work did not cause any trouble in the operation of trains (S. F. 176), and to see that the work performed by Nichols conformed to the contract. (S. F. 376.)

Deceased was employed by W. H. Nichols & Co., Inc.'s foreman. (S. F. 104.) Nichols' foreman told him when to come to work and what to do (S. F. 43); when to quit work and when the machine was going to be moved (S. F. 43). Nichols paid his employees, deducted their income tax (S. F. 46); and deducted their social security. (S. F. 47.) Respondent never paid Nichols' employees. (S. F. 47.) Respondent never made any deductions from their salaries, never told them when to come to work, nor when to quit. (S. F. 47.) Nichols' foreman fired Nichols' employees. (S. F. 48.) Petitioner understood that her decedent worked for Nichols. (S. F. 192-193.)

Petitioner filed her notice for fatal injuries and claim for workmen's compensation benefits with the Industrial Accident Board of the State of Texas, and in both instruments specified the employer of the deceased to be W. H. Nichols & Co., Inc. (S. F. 194-196.) Employers Mutual Liability Insurance Company of Wisconsin, the compensation carrier for W. H. Nichols Co., Inc. recognized its liability and made a lump sum settlement on account of the death of decedent, and paid workmen's compensation benefits in the sum of SEVEN THOUSAND NINE HUNDRED NINETEEN AND 94/100 ($7,919.94) DOLLARS (Tr. 14).

Petitioners have never acknowledged that they improperly claimed benefits under the Workmen's Compensation Laws of the State of Texas, and have done nothing to change the representations which they made upon which they recovered workmen's compensation benefits. (S. F.

196.) Petitioners do not even acknowledge that the workmen's compensation carrier, Employers Liability Mutual Insurance Company of Wisconsin, will be entitled to recoup its payment in the event Petitioners should be successful in this effort to recover from Respondent. (S. F. 207.)

The contract between Respondent and W. H. Nichols & Co., Inc. was not a scheme or device to evade the provisions of the Federal Employer's Liability Act. It was entered into because Respondent did not have the equipment or knowledge necessary to do the work. The work is extraordinary maintenance. (S. F. 371.)

ARGUMENT

The Petition should be denied because:

1. The judgment of the Court of Civil Appeals of the State of Texas was correct;

2. The judgment can be sustained on the basis of the laws of the State of Texas without regard to federal questions; and

3. No question of importance is presented to the Court because,

(a) The disposition of the case is controlled by the particular facts applicable to the parties;

(b) The effect of the decision is limited in its scope to other employees employed under the contract in question.

1. The Judgment of the Court of Civil Appeals is Correct.

By its terms the Federal Employers' Liability Act is applicable only to a person suffering injury while he is employed by a common carrier by railroad. *45 U. S. C. Sec.*

51.[1] This Court held in *North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 256, 58 L. Ed. 591, 34 Sup. Ct. 305:*

> "In order to bring the case within the terms of the Federal Act (35 Stat. 65, c 149, printed in full and 223 U. S., page 6) defendant (the Railroad) must have been, at the time of the occurrence in question, engaged as a common carrier in Interstate Commerce, and plaintiff's intestate must have been *employed* by said carrier in such commerce." (Emphasis supplied.)

The words "employee" and "employed" are used in the statute in their natural sense and are intended to describe the conventional relation of employer and employee. *Robinson v. Baltimore and Ohio R. R. Co., 237 U. S. 84, 35 Sup. Ct. 491, 59 L. Ed. 849. Dougall v. Spokane P. & S. Ry. Co., 207 Fed. 2d 843 (certiorari denied, 1954), 347 U. S. 904, 98 L. Ed. 1063, 74 Sup. Ct. 429.* That this court still recognizes the validity of this statement of the law is demonstrated in Footnote 5 of the recent opinion in *Sinkler v. Missouri P. R. Co., 356 U. S. 326, 78 Sup. Ct. 758, 762, 2 L. Ed. 2d 799.*

a. *Respondent Owed Decedent No Non-Delegable Duty.*

Petitioner seeks to impose liability on Respondent on the theory that it had a non-delegable duty to maintain its roadbed with the corrollary postulate that such maintenance could be performed only by its own employees. Respondent's duty to maintain its roadbed is to its passengers and not to its contractor's employees. Such duty is not non-delegable insofar as employees of independent contractors are concerned. *Norman v. Spokane-Portland & Settle Ry.*

[1] Appendix, page 15.

Co., 101 Fed. Sup. 350, affirmed, 192 Fed. 2d 1020, certiorari denied, 342 U. S. 945, 72 Sup. Ct. 558, 96 L. Ed. 703; Dougall v. Spokane P. & S. Ry. Co., 207 Fed. 2d 848 (certiorari denied), 347 U. S. 904, 98 L. Ed. 1063, 74 Sup. Ct. 429; Tinsley v. Massman Construction Co., et al., 270 S. W. 2d 835 (Sup. Ct. Missouri); and *Lees v. Chicago and Northwestern Ry. Co., 89 N. E. 2d 418 (Illinois Appellate Division).*

b. *No Evidence of Respondent's Intent to Evade the Provisions of the Federal Employers Liability Act.*

The only evidence germane to Respondent's intent in contracting with W. H. Nichols & Co., Inc. is the testimony of its assistant chief engineer that the contract was not a scheme or device to circumvent the Federal Employers' Liability Act; that the contract was entered into because Respondent lacked the equipment and knowledge necessary to do the work. (S. F. 371.) The contract was let on bids. (S. F. 370.) There is no evidence of stock ownership in Nichols by Respondent. (S. F. 166.) There is no evidence that Respondent had ever performed this extraordinary maintenance with its own employees or that any of Nichols' officers or employees had ever been in the employ of Respondent.

The only prohibition of the Act *(45 U. S. C. Sec. 55)* is that any contract, rule or regulation or other device whatsoever, "the purpose or intent of which shall be" to permit the common carrier to exempt itself from the liability created by the Federal Employers' Liability Act shall be void. It is clear from the very wording of the statute as

well as from cases such as *Cimorelli v. N. Y. Cent. Ry. Co., 148 Fed. 2d 575; Erie Railroad Co. v. Morgue, 23 Fed. 2d 664* and *Lees v. Chicago & Northwestern Ry. Co., 89 N. E. 2d 418 (Illinois Appellate Division)*, that whether the "purpose or intent" of the contract is to exempt a carrier from liability created by the Federal Employers' Liability Act is a question of fact. There was no evidence before the court below upon which a finding could have been predicated that Respondent had the intent of evading its responsibilities under the Federal Employers' Liability Act. In any event Petitioners waived any right which they may have had to secure a favorable finding of fact on that issue, as will be later demonstrated.

c. *No Evidence of Probative Value Raising Issue of Nichols' Status Being Other Than That of Independent Contractor.*

The contract between Respondent and Nichols is clear that Respondent did not retain the *right* of control of the details of the performance of the work. It is the *right* of control which is determinative of the issue of whether a contractor is an independent contractor or merely an agent of the owner. *Chicago, Rock Island & Pacific Ry. v. Bond, 86 Sup. Ct. 403, 60 L. Ed. 735, 240 U. S. 449, Dougall v. Spokane P. & S. Ry. Co., 207 Fed. 2d 843 (certiorari denied), 347 U. S. 904, 74 Sup. Ct. 429, 98 L. Ed. 1063.* The fact of actual exercise of control by the railroad is immaterial. The controlling factor is the right or authority to control. *Cimorelli v. New York Central Ry. Co., 148 Fed. 2d 575, 578.* That Respondent's inspector, Slaton, may have

given instructions with respect to the mixture being used when it did not comply with the specifications, or other similar instructions is immaterial. Respondent did not retain the right of control of the details of the work.

> "The mere fact that the employer reserves the right to supervise or inspect the work during its performance does not make the contractor a mere servant, where the mode and means of performance are within the control of such contractor." *Conasauga River Lbr. Co. v. Wade, 221 Fed. 2d 312, 315 (certiorari denied), 350 U. S. 949, 76 Sup. Ct. 324, 100 L. Ed. 827.*

All of the indicia of the independent nature of Nichols' employment are present. *Del Vecchio v. Penn. R. R. Co., 233 Fed. 2d 2, 5, Conasauga River Lbr. Co. v. Wade,* supra.

2. Judgment Can Be Sustained on Local Law.

In the court below Petitioner relied on the dicta in *Miles v. Penn. R. R. Co., 182 Fed. 2d 411,* where the court said:

> "Admittedly, the defendant could not have escaped the liability imposed by this Act by contracting with the contractor to take over the *ordinary* and necessary maintenance work on track which is used in Interstate Commerce." (Emphasis supplied.)

Petitioners also relied on their contention that the contract between Respondent and Nichols was a device to evade the provisions of the Federal Employers' Liability Act. Whether the work was ordinary or extraordinary maintenance and the intent of the contracting parties at most suggest fact issues. No issues were submitted by the court to the jury inquiring whether the work performed by Nichols was ordinary or extraordinary maintenance, or whether the intent of Respondent was to evade the pro-

visions of the Federal Employers' Liability Act. No special issues were requested by Petitioners submitting either of these theories. No issue having been submitted or requested by Petitioners, Petitioners, under the rules of procedure of the State of Texas, waived any right of recovery that might be based on favorable findings on such issues. *Texas Rules of Civil Procedure, Rule 279.*[1]

Having waived any right they may have had to fact findings by the jury on the questions just discussed, the trial court, as well as the court below, had before it the sole question of whether at common law there was any evidence that Nichols occupied any status other than that of independent contractor. The law in Texas is against the contentions of Petitioners and supports the judgment of the court below. The retention of the right or the exercise of the right to see that the work performed by the contractor complies with the contract does not transform the contractor into an agent as distinguished from an independent contractor. *Security Union Ins. Co. v. McLeod, 36 S. W. 2d 449, 451 (Comm. of App.); Simonton v. Perry, 62 S. W. 1090, 1091 (Civ. App.); Travelers Ins. Co v. Ray, 262 S. W. 2d 801, 803, Er. Ref.; Texas Employers' Insurance Association v. Harper, 249 S. W. 2d 677, er. ref., n. r. e.*

By its terms the workmen's compensation laws of the State of Texas are inapplicable to employees of a steam railroad. *Article 8306, Sec. 2, Revised Civil Statutes of Texas, 1925.*[2] Petitioners filed their notice of fatal injury and claim for workmen's compensation benefits with the

[1] Appendix, page 15.
[2] Appendix, page 17.

Industrial Accident Board of the State of Texas designating W. H. Nichols & Co., Inc. as employer (S. F. 194-196). Employers Mutual Liability Insurance Company of Wisconsin, the compensation carrier for Nichols, paid Petitioners compensation benefits in the sum of SEVEN THOUSAND NINE HUNDRED NINETEEN AND 94/100 ($7,919.94) DOLLARS (Tr. 14). Even after the filing of the instant suit in which Petitioners contend that their decedent was an employee of Respondent, they have done nothing to withdraw their representations to the workmen's compensation carrier. (S. F. 196.) Petitioners' counsel does not even concede that the compensation carrier is entitled to recoup its compensation payment (S. F. 207) in spite of the right of subrogation afforded compensation carriers against negligent third parties by the workmen's compensation laws of the State of Texas. *Article 8307, Sec. 6a Revised Civil Statutes 1925.*[1]

The notice of fatal injury and claim for death benefits under the workmen's compensation laws of the State of Texas were admissible against Petitioners as admissions. *Texas General Indemnity Co. v. Scott, 253 S. W. 2d 651, 152 Tex. 1.*

At the outset Petitioners had the option of contending that their decedent was an employee of Respondent and that they, therefore, were entitled to maintain their action under the Federal Employers' Liability Act, or of claiming that their decedent was an employee of Nichols and that they were entitled to the benefits of the workmen's compen-

[1] Appendix, page 17.

sation laws of the State of Texas. Petitioners pursued their remedy to fruition under the workmen's compensation statutes. By filing their notice of fatal injury and claim for compensation Petitioners made admissions against any interest they may have had under the Federal Employers' Liability Act. On the basis of this admission the court below could find that there was no issue of decedent occupying the status of employee of Respondent.

3. No Question of Importance is Presented.

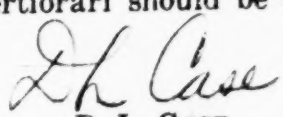
From the petition it is apparent that Petitioners have undertaken to present a fact issue to this Honorable Court. The facts are peculiar to the contract between Respondent and Nichols and to the relationship of the parties under the contract. It is obvious from the record as a whole that the number of employees situated similarly to deceased is limited, and that the contract must have long since been performed. A reversal of the decision below could affect only a small number of employees of Nichols whose claims, if any they have, in all probability have long since been barred by the limitations provisions of the Federal Employers' Liability Act. The relief, therefore, which Petitioners seek is in reality only a review of the facts before the courts below which could at most have an affect on a segment of the population. The court has heretofore refused certiorari on substantially the same fact questions. *Dougall v. Spokane P. & S. Ry. Co., 207 Fed. 2d 843 (certiorari denied), 347 U. S. 904, 98 L. Ed. 1063, 74 Sup. Ct. 429.*

CONCLUSION

The decision of the court below conforms to the applicable decisions of this Honorable Court as well as the various courts of appeal. This Honorable Court has seen fit to deny certiorari in a fact situation substantially identical to that before the court below. The petition presents no novel question of law, but one that has been decided many times by this Court as well as the Courts of Appeals and presents only a limited fact situation for review under the applicable decisions.

The action of the court below is amply justifiable by the law of the State of Texas without regard to federal decisions.

The position of Petitioners is in essence that they are dissatisfied with the decisions of the courts below and seek mere appellate relief. Respondent, therefore, respectfully submits that the petition for certiorari should be denied.



D. L. CASE
Counsel for Respondent.

Of Counsel:
JACKSON, WALKER, WINSTEAD, CANTWELL & MILLER,
2800 Republic National Bank Bldg.,
Dallas 1, Texas.

APPENDIX

U. S. C. Title 45, Sec. 51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Texas Rules of Civil Procedure. Rule 279. Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the writ-

ten pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing at any time before the judgment is rendered, make and

file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

Revised Civil Statutes of the State of Texas 1925. Art. 8306, Sec. 2. Application of law; exceptions

Sec. 2. The provisions of this law shall not apply to actions to recover damages for personal injuries nor for death resulting from personal injuries sustained by domestic servants, farm laborers, ranch laborers, nor to employes of any firm, person or corporation having in his or their employ less than three employes, nor to the employes of any person, firm or corporation operating any steam, electric, street, or interurban railway as a common carrier. Any employer of three or more employes at the time of becoming a subscriber shall remain a subscriber subject to all of the rights, liabilities, duties and exemptions of such, notwithstanding after having become a subscriber the number of employes may at times be less than three.

Revised Civil Statutes of the State of Texas 1925. Art. 8307, Sec. 6a Recovery from third person, subrogation; compromise

Sec. 6a. Where the injury for which compensation is payable under this law was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employe may at his option proceed either at law against that person to recover damages or against the association for compensation under this law, but not

against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under this law. If compensation be claimed under this law by the injured employe or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employe in so far as may be necessary and may enforce in the name of the injured employe or of his legal beneficiaries or in its own name and for the joint use and benefit of said employe or beneficiaries and the association the liability of said other person, and in case the association recovers a sum greater than that paid or assumed by the association to the employe or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recovered shall be paid to the injured employe or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employe or his beneficiaries and the approval of the board, upon a hearing thereof.